

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

Criminal Action No. 5:16CR16-01
(STAMP)

SHAWN LAMONT McCLAIN
a/k/a "GUCCI,"

Defendant.

MEMORANDUM OPINION AND ORDER
AFFIRMING AND ADOPTING THE REPORT AND
RECOMMENDATION OF THE MAGISTRATE JUDGE

I. Background

On April 5, 2016, the defendant was indicted for the following offenses: (1) conspiracy to possess with intent to distribute and to distribute heroin and fentanyl, in violation of 21 U.S.C. §§ 846 and 841(b)(1)(C); (2) distribution of heroin and fentanyl within 1,000 feet of a protected location, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C); and (3) distribution of heroin and fentanyl, in violation of 21 U.S.C. §§ 841(a)(1) and 841 (b)(1)(C).

Counsel for the defendant later filed a motion to dismiss the indictment, to which the government responded and the defendant replied. ECF Nos. 28, 33, and 46, respectively. In the defendant's reply, he requested that his motion to dismiss be withdrawn. United States Magistrate Judge James E. Seibert entered a report and recommendation, wherein he recommends that the motion to dismiss be denied as moot based on the defendant's request.

Furthermore, on July 21, 2016, this Court conducted a change of plea hearing, at which the defendant changed his plea to guilty as to Counts One, Six, and Seven of the indictment. The parties did not file objections to the report and recommendation.

For the reasons set forth below, the report and recommendation of the magistrate judge is AFFIRMED AND ADOPTED.

II. Applicable Law

Pursuant to 28 U.S.C. § 636(b)(1)(C), this Court must conduct a de novo review of any portion of the magistrate judge's recommendation to which objection is timely made. As to findings where no objections were made, such findings and recommendations will be upheld unless they are "clearly erroneous or contrary to law." 28 U.S.C. § 636(b)(1)(A). As the Supreme Court of the United States stated in United States v. United States Gypsum Co., "a finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." 333 U.S. 364, 395 (1948).

III. Discussion

In the defendant's reply in support of his motion to dismiss, the defendant requests the following: that the "previously filed Motion to Dismiss be withdrawn[.]" ECF No. 46. Based on the representations by counsel and the fact that no objections were filed by either party, this Court agrees with the recommendation of

Magistrate Judge Seibert. Therefore, the report and recommendation is AFFIRMED AND ADOPTED. Accordingly, the defendant's motion to dismiss is hereby DENIED AS MOOT.

IV. Conclusion

For the reasons set forth above, the report and recommendation (ECF No. 49) is AFFIRMED AND ADOPTED. Accordingly, the defendant's motion to dismiss (ECF No. 28) is hereby DENIED AS MOOT.

Finally, this Court finds that the defendant was properly advised by the magistrate judge that failure to timely object to the report and recommendation in this action would result in a waiver of appellate rights. Because the defendant has failed to object, he has waived his right to seek appellate review of this matter. See Wright v. Collins, 766 F.2d 841, 844-45 (4th Cir. 1985).

IT IS SO ORDERED.

The Clerk is directed to transmit copies of this Order to the defendant, to counsel of record herein, to the United States Probation Office and to the United States Marshals Service

DATED: July 21, 2016

/s/ Frederick P. Stamp, Jr.
FREDERICK P. STAMP, JR.
UNITED STATES DISTRICT JUDGE